In the United States
Circuit Court of Appeals

No. 8147

W. E. JAMES and
AGNES JAMES,
Appellants,

vs.

O. A. NELSON, as an Individual,
O. A. NELSON, as a Trustee,
N. P. NELSON, CHARLES
HAWKINS and CHARLES McMAHAN,
Appellees.

Upon Appeal from the United States District Court for the Territory of Alaska, Third Division.
Honorable Simon Hellenthal, Judge.

Brief of Appellees

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FURTHER STATEMENT OF THE CASE

We are unable to accept the Statement of the Case as set out in the Brief of Appellants as being a correct statement of the facts involved and proved at the trial, nor is that statement sustained by the Findings of the Trial Court.

At the outset it is necessary that the Court have in

mind the distinction between O. A. Nelson, N. P. Nelson, and John S. M. Nelson, who by a conicidence happen to have the same surname.

Long prior to the series of events which gave rise to this litigation, Appellants became indebted to The First Bank of Cordova, and to secure this indebtedness gave to the bank several promissory notes totaling $5,150, one for $2,860 being endorsed by the Chitina Cash Store, owned by O. A. Nelson and John S. M. Nelson, since deceased; and in addition gave the bank a mortgage covering the mining claims involved in this action. They likewise became indebted to the Chitina Cash Store for merchandise and supplies in the amount of $530.00 on open account and $1,945.00 upon a promissory note.

During the month of January, 1932, The First Bank of Cordova commenced an action to foreclose its mortgage upon these mining claims, but before judgment was obtained a letter was written to Appellants on behalf of the Bank suggesting that some arrangement might be made whereby the Appellants should turn the property over to the Bank and the Chitina Cash Store and the latter would try to lease it and later return it to Appellants, after they were able to liquidate Appellants' indebtedness. (Tr. 87)

Appellants replied suggesting that O. A. Nelson be sent to Chisana. (Tr. 88)

In April, 1933, O. A. Nelson went to Chisana, taking with him a form of deed and bill of sale from Appellants

to himself, he being named therein as Trustee. It is the undisputed testimony of all of the parties that after his arrival Appellants did not desire to enter into the arrangement suggested whereby they were to eventually get back the ground, but on the contrary on April 11, 1933, executed and delivered the deed and bill of sale to O. A. Nelson as an outright and final transfer of the property for the satisfaction of the indebtedness due the Chitina Cash Store and The First Bank of Cordova, and the additional agreement that they were to receive a lease upon a small piece of the mining ground for the season of 1933. At the trial appellants claimed that certain of their other creditors were to be paid also by the Bank and the Chitina Cash Store, while appellees contended that this was not a part of the agreement. The execution and delivery of this deed and bill of sale to O. A. Nelson was not at issue in this case, having been alleged in the Complaint of Appellants and admitted and re-alleged by each of the Appellees in their separate answers. (Tr. 5, 20, 34, 43, 55)

After the execution and delivery of the Deed, O. A. Nelson returned to Chitina, Alaska, and entered into negotiations with Appellee N. P. Nelson regarding a lease for a part of the mining claims covered by the Deed.

Notwithstanding the deed, Appellee N. P. Nelson would not take the lease until further confirmation from Appellants.

O. A. Nelson wrote Appellant W. E. James on April 13th, as follows: (Tr 90)

"Copy for you to keep.
"April 13th, 1933.
"Mr. W. E. James,
"Chisana.

"My dear James:

"I was busy yesterday getting a line on things and I talked with Donohoe over the phone. He said it suited the bank all right for you to have the piece of ground at the South of Eldorado. I will not have time to make a lease to it this morning, and I do not know if Gillam will stop here again before he goes directly to Chisana with your stuff. If I have time I will make the lease and send it in with Gillam on this trip, but if I do not I will send it in by the next mail and you can go ahead with your plans, knowing that it is coming in.

"The bank's first proposal was that they hold the ground in trust till the debts were paid and then return the ground to you, but any unexpired leases that the Bank might give would hold until they expired. I understand that you preferred to give up all claim to the ground for all time with the understanding that you get the lease for a year on a plot of ground selected by yourself 100 by 100 feet, on Bonanza Creek at the mouth of Little Eldorado, and also that the Bank of Cordova and the Chitina Cash Store would accept the bill of sale for the ground as full and final satisfaction for the amounts you owe the two institutions.

"I do not want any possibility for a misunderstanding and if this is the way you intended the matter to stand, I wish you would write a note on the bottom of this page to that effect and sign it. It will not be necessary for Mrs. James to sign this for it is simply for my information and whatever you say is what will hold.

"Please return this by Gillam this trip if you can.

"Very truly yours,

"O. A. NELSON."

He received the following reply dated April 16th from Appellant: (Tr. 92)

"Chisana, Alaska, April 16, 1933.

"Dear Mr. Nelson:

"In reply to the letter of the 13th, 1933. I prefer to the proposition of your cleaning up all of my indebtedness in First Bank of Cordova and Chitina Cash Store by deed for all time, returning me notes and receipts paid in full.

"I am to have the lease on the said mentioned ground to mine this summer or seaon, and to keep whatever gold I may recover from same; also the use of cabin on No. 6 Claim while mining same. I reserve my personal effects. Also giving a list of equipment that the deed covers, 1 sawmill, 35 h. p. boiler; 1 steam engine, 18 h. p., 1 log building situated at mill site, 1 planer, 1 cabin situated in town of Chisana, 1 cabin, log, situated on No. 1 Chathenda Creek, 1 frame cabin on 5, 1 frame cabin situated 6, 1 prospecting boiler on 1 above Discovery, 1 hydraulic plant.

"W. E. JAMES."

On April 17th, 1933, O. A. Nelson gave to N. P. Nelson a lease (Tr. 127) covering a portion of the mining claims.

The undisputed testimony regarding this is as follows: (Tr. 136)

"(Cross examination of Mr. O. A. Nelson)

"Q. So the letter was written to you on the 16th; you received it and you made out the lease on the 17th, and that all took place in that short time? Do you want the Court to understand that?

"A. I do. I didn't make that lease out until after I got the letter back because N. P. Nelson wouldn't accept the lease until he knew the ground was in the clear."

Immediately thereafter N. P. Nelson went to Chisana and took possession of the ground covered by the lease and remained there during the whole of the mining season of 1933 (Tr. 139), with the knowledge and consent of the Appellants, prospecting the ground; shipping in a very large quantity of supplies (Tr. 118, 119); doing dead work; (Tr. 118) constructing a ditch line and a mile of flume (Tr. 118, 140). Appellants turned over to him cabins and other property (Tr. 119); discussed with third persons N. P. Nelson's operations (Tr. 142, 143); and by their representations and conduct led N. P. Nelson to accept the lease; change his position to his great detriment in devoting the entire season to preparation for actual mining, doing dead work, bringing in supplies, etc., so much so that after being able to actually hydraulic in 1934 and recover $9,000, he was still in the hole $7,540.

The first time that Appellants made any objection to N. P. Nelson was in October, 1933.

In the meantime and on April 20th, 1933, O. A. Nelson had given to Appellants the lease on the tract of ground 100 feet by 100 feet, which they desired for the season of 1933 and they had accepted this lease and confined their operations to this property. (Tr. 109). In

contravention of their claim that during this whole period they claimed the ground as though not deeded, they had relocated some of it and caused others to do so. (Tr. 111, 112, 115) Mr. James testified that he considered that Mr. O. A. Nelson violated his agreement on October 12th. (Tr. 110) Other leases had been given by O. A. Nelson to others of the Appellees, but they had run out or been surrendered before the trial.

O. A. Nelson did not tender the cancelled notes and mortgage to Appellants until the fall of 1933, and Appellants refused to accept them at that time.

The trial court in its Findings held that the tender came too late and that the Deed should be cancelled, but that the Appellants were estopped to deny the validity of the lease to Appellee N. P. Nelson, its findings supporting the statement of the case as given here and as claimed by N. P. Nelson. (Tr. 166, 167, 170, 173, 174)

The claim made now as to a value of $150,000 for the claims covered by the Deed is not sustained and is grossly exaggerated. Appellants only claimed $50,000 in their complaint, (Tr. 11) and the evidence showed that the ground was nearly worked out, (Tr. 142); that Appellants did not have water to work the bench ground (Tr. 113); that they had been making only a bare living for some years (Tr. 101, 103), and had been unable to recover enough to make any payments on their indebtedness. (Tr. 87)

ARGUMENT

The Appellants in their brief have confined themselves to the question of estoppel as found by the trial court against their denying the validity of the lease held by Appellee N. P. Nelson, so this brief will be restricted to the same issue.

DISCUSSION OF LAW CITED BY APPELLANTS

The question of pleading will be considered subsequently in a separate section.

With reference to the argument set forth commencing with page 28 of Appellant's brief, under the heading "Estoppel Cannot Be Invoked From The Record," we concede that the law is as there set forth; namely, that the deed given by Appellants to O. A. Nelson, although in fact recorded was not entitled to record, as it was not acknowledged; but we respectfully urge that this question is of no importance in the present case because we are not dealing with a question of constructive notice. When they say this deed "constituted no notice to N. P. Nelson of any right, title, or interest in O. A. Nelson" they are mistaken as to the effect of the deed. It is not necessary that there be any "constructive" notice, as is recognized in all of the cases cited by them.

It cannot be seriously contended that the deed was not effective to pass title even though it could not be properly recorded until acknowledged thereafter or proven as provided by the **Compiled Laws of Alaska, 1933:**

"Sec. 2828. Proof of execution by witness. Proof of the execution of any conveyance may be made before any officer authorized to take acknowledgement of deeds, and shall be made by a subscribing witness thereto, * * * *

"Sec. 2833. Deed proved may be read in evidence; recording. Every conveyance acknowledged or proved or certified in the manner hereinbefore prescribed by any of the officers before named may be read in evidence without further proof thereof, and shall be entitled to be recorded in the precinct in which the lands lie."

The execution and delivery of this deed were not in issue in the case, as its execution and delivery were alleged by Appellants and set out "in haec verba" by them in their complaint (Tr. 5, 20), and admitted and realleged by Appellees (Tr. 34, 43, 55). And, in fact, it did have two witnesses, as is apparent from an inspection of the Transcript of the Record and the testimony of Appellant. (Tr. 89)

Appellants insist that in any event because the word "Trustee" was used in the deed, N. P. Nelson should have been on guard. The simple answer to that is that N. P. Nelson, even when he saw the deed, refused to go ahead with the lease until the Appellants had confirmed it as an outright conveyance by their letter of April 16, 1933. (Tr. 92, 136)

We shall not attempt a detailed discussion of the cases cited by Appellants in other portions of their brief, for the reason that none of them, with the exception of **New York Life Insurance Company v. Reese, 19**

F. (2d) 781, have facts even remotely resembling the facts involved in the present case. The Court will note that the 8th C. C. A., in the **Reese case commencing at page 786,** reversed itself upon rehearing and held that the estoppel was good. The case is, in fact, authority in support of our contentions.

PLEADING ESTOPPEL

Estoppel was not raised for the first time by the judge of the trial court when he rendered his opinion. Acquiescence and estoppel were in fact the whole basis of the affirmative defense set up by Appellee N. P. Nelson in his answer. He alleged the execution and delivery of the deed from Appellants to O. A. Nelson; their subsequent confirmation to him of that deed thereafter; the execution and delivery of the lease from O. A. Nelson to himself; and that he entered into possession of the ground with the full knowledge and consent of the Appellants (Tr. 34, 35, 36, 37). Appellants did not move against this affirmative defense by motion in any manner nor did they demur thereto; evidence in support of the question of estoppel was introduced by Appellee without objection upon their part and they in turn, both upon cross examination and by direct testimony of their own witnesses, accepted the issue upon the trial of the case.

(a) Necessity of Pleading at All.

"However, it was well settled at common law

that an estoppel in pais need not be pleaded. See **Bigelow on Estoppel (4th Ed.) p. 668, et seq.**, and references in the notes. It is settled in this state that an estoppel of record, though not pleaded, may be received as evidence of the fact in issue, and when received is conclusive. **Krekeler v. Ritter, 62 N. Y. 372.** A fortiori, an estoppel in pais, may be proved without being pleaded, and if proved is equally conclusive."

Feinberg v. Allen, 101 N. E. 893. (N. Y.)
Dreyfuss Dry Goods Co. v. Lines, 18 F (2d) 611.

(b) Not Necessary to Plead Specifically.

We are aware that some of the courts do not so hold that an estoppel can be put in issue by a general denial, but even in these courts it is a universal rule that it is not necessary to plead an estoppel in so many words.

"And, finally, it is said that estoppel is not pleaded. The facts are set out in the complaint, and the failure to allege that by reason thereof the defendants are estopped to assert title to the property in question as against the plaintiff is not fatal after trial. Equity is not governed by such technical rules. Where facts which entitle the plaintiff to the relief sought are set out in the complaint and sustained by the testimony, the relief will, after answer and trial, be granted, notwithstanding the complaint may lack some of the requisites of a technical pleading."

Carlyle v. Sloan, 75 P. 217. Ore.
City of Ironton, Ohio, v. Harrison Const. Co., 212 F. 353. C. C. A. 6th.
Johnson v. Schimpf, 239 P. 401. Calif.
Daniel v. Pappas, 220 P. 355. Okla.
Bank of Chelsea v. Elam, 30 P. (2d) 919. Okla.
Hirsch Rolling Mill Co. v. Milwaukee & Fox Valley Ry. Co. 161 N. W. 741. Wis.
Putnam v. Chase, 212 P. 365. Ore.

"It is not expressly alleged that appellant had actual knowledge of the facts; but the representations made by him were made under such circumstances that a knowledge of the truth is necessarily imputed to him. Nor is it expressly alleged that the representations were made with the intention that appellee should act upon them. But the property had been sold by appellant to appellee's vendor, who was then in possession. This vendor had the apparent title and power of disposition, and had been clothed with these by appellant * * * *

Hufford v. Lewis, 64 N. E. 99. Ind.

(c) No Plea Necessary Where Issue Joined at Trial.

"We hold, however, that where, in a suit in equity as in this case, testimony as to facts, upon which an estoppel is contended for, is introduced, not only without objection but contentious testimony disputing such facts is produced on the other side, the contention for an estoppel may be made at the hearing without having been pleaded."

Standard Sanitary Mfg. Co. v. Arrott, 135 F. 750, 756, C. C. A. 2d.
Horn v. Abts, 19 F. (2d) 350. C. C. A. 8th.
Grand Valley Water Users' Ass'n v. Zumbrunn, 272 F. 943. C. C. A. 8th.
New York Life Ins. Co. v. Rees, 19 F. (2d) 781, 787. C. C. A. 8th. (Case cited by Appellants.)
Andrew v. Miller, 250 N. W. 711. Iowa.
Resetar v. Leonardi, 216 P. 71. Calif.
Hubbard v. Lee, 92 P. 744. Calif.
Beckjord v. Traeger, 39 P. (2d) 523. Calif.

TOO LATE TO RAISE ISSUE OF PLEADING

Entirely irrespective of whether or not the pleading in Appellee's separate answer and affirmative defense was sufficint or not, it is a universal rule upheld by the Supreme Court and the 9th Circuit Court of Appeals that appellants were too late in raising the issue.

"The supreme court of the territory rightfully held that the defendant should have raised the question in the trial court, where ample power exists to correct and amend the pleadings, and, not having done so, but having gone to trial on the merits, the defendant was precluded from assigning error, for matters so waived.

"The doctrine on this subject is well expressed in the case of **Tyng v. Commercial Warehouse Co., 58 N. Y. 313**: 'No question appears to have been made during the trial in respect to the production of evidence founded on any notion of variance or insufficiency of allegation on the part of the plaintiff. Had any such objection been made it might have been obviated by amendment in some form or upon some terms under the ample powers of amendment conferred by the code of procedure. It would, therefore, be highly unjust, as well as unsupported by authority, to shut out from consideration the case, as proved, by reason of defects in the statements of the complainant. Indeed, it is difficult to conceive of a case in which, after trial and decision of the controversy, as appearing on the proofs, when no question has been made during the trial in respect to their relevancy under the pleadings, it would be the duty of a court, or within its rightful authority, to deprive the party of his recovery on the ground of incompleteness or imperfection of the pleadings.' "

Wasatch Mining Company v. Crescent Mining Company, 148 U. S. 293, 37 L. ed. 454, 458.

Norton v. Larney, 266 U. S. 511, 69 L. ed. 413

Twin City Fire Ins. Co. v. Stockmen's Nat. Bank, 261 F. 470. C. C. A. 9th.

Martin v. Imbrie, 262, F. 44. C. C. A. 2d.

Pennsylvania R. Co. v. Burgerson, 296 F. 311, C. C. A. 3d.

New York Underwriters Fire Ins. Co. v. Malham & Co., 25 F. (2d) 415. C. C. A. 8th.

Schmidt v. United States, 63 F. (2d) 390. C. C. A. 8th.

Chickasha Cotton Oil Co. v. Roden, 66 F. (2d) 127 C. C. A. 10th.

Tucker v. Newton, 256 P. 440. Calif.

Kohler & Chase Co. v. Savage, 167 P. 789. Ore.

Even where the appellate court has no doubt that the answer or complaint was defective the issue cannot be raised.

Grant Brothers Construction Company v. United States, 232 U. S. 647, 58 L. ed. 776.

Huse v. United States, 222 U. S. 496, 56 L. ed. 285.

Lorenz Co. v. Gray, 298 P. 222. Ore.

Smellie v. Southern Pac. Co., 276 P. 338. Calif.

Fairley v. Falcon, 214 N. W. 538. Iowa.

FINDINGS OF TRIAL COURT

The trial court in this case sustained by its Findings, based upon the conflicting evidence introduced at the trial, the contention of Appellee N. P. Nelson that he took the lease of the mining ground because of the deed given by Appellants to O. A. Nelson, and because of their subsequent confirmation of this deed by letter dated April 16th, 1933; that he immediately entered into possession of the ground with their knowledge and consent; that Appellants by their acts and conduct consented to his changing his position to his damage and

detriment by doing a great deal of work and expending a large sum of money during the year 1933; and that Appellants were estopped to deny the validity of the lease to Appellee N. P. Nelson taken by him in good faith and acted upon by him without any knowledge or reason to believe that the deed might thereafter be set aside.

The Ninth Circuit Court of Appeals has repeatedly held that it will not disturb the findings of the trial court on conflicting testimony taken in open court except for manifest error.

Pacific American Fisheries v. Hoof, 291 F. 306. C. C. A. 9th.

Gila Water Co. v. International Finance Corporation, et al. 13 F. (2d) 1. C. C. A. 9th.

Easton v. Brant, 19 F. (2d) 857. C. C. A. 9th.

Graff v. Town of Seward, Alaska, et al. 20 F. (2d) 816. C. C. A. 9th.

Appellants did not themselves claim that the deed was invalid until October 12th, 1933, at which time Appellee N. P. Nelson had been working under this lease and had been in possession of the mining claims for approximately six months—since April 17th, 1933. (Tr. 110)

THE LAW OF ESTOPPEL

We shall not attempt to discuss the facts, except incidentally, as they are set forth in the Statement of the Case (supra) but shall endeavor to give what we conceive the law to be in relation to those facts.

(a) **Generally:**

"The defenses referred to in the second question certified are likewise substantially identical, and allege in sufficient form and in effect that all the stockholders of the Wabash Company, including the plaintiff, had prior to the commencement of the action acquiesced in the transaction as averred in the defenses referred to in the first question certified. Acquiescence as a defense has, speaking generally, a dual nature. It may, upon one hand, rest upon the principle of ratification, and may be denominated implied ratification, or it may, upon the other hand, rest upon the principle of estoppel, and may be denominated equitable estoppel. The former principle underlies it when the conduct of a plaintiff, relating to the transaction or matter complained of by him, subsequent to the rise of it, justifies and supports the normal and reasonable conclusion that he, by his assent thereto or acquiescence therein, has accepted and adopted it. His ratification is implied through his acquiescence, instead of expressed by positive and distinct action or language. * * * * The latter principle underlies it when a plaintiff against whom it is invoked remained silent or inactive when there was the opportunity and the duty to speak or act."

Pollitsz v. Wabash R. Co., 100 N. E. 721, 725. N. Y.

The Ninth Circuit Court of Appeals has established the rule which binds the Appellants in cases of this nature even though they may in fact have had no intention to mislead or may have been innocent of any intention of wrongdoing.

"Having allowed the defendant in error to act upon the understanding had by both parties, the plaintiff in error cannot now deny that understanding, to the loss or injury of the defendant in error.

* * * * 'The vital principle (of estoppel in pais) is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted.' * * * * 'Equitable estoppel, in the modern sense, arises from the conduct of a party, using that word in its broadest meaning as including his spoken or written words, his positive acts, and his silence or negative omission to do anything. Its foundation is justice and good conscience.' * * * * 'Thus negligence becomes constructive fraud, although, strictly speaking, the actual intention to mislead or deceive may be wanting, and that party may be innocent, if innocence and negligence may be deemed compatible. In such cases the maxim is justly applied to him that, when one of two innocent persons must suffer, he shall suffer who by his own acts occasioned the confidence and loss.' ''

Pacific Mill & Mining Co. v. Leete, 94 F. 968 at 975. C. C. A. 9th.

(b) Alaska Cases.

Two mining cases from Alaska involving a similar state of facts to those in this case have heretofore been before the Court upon appeal, and in both of these cases the court has sustained the estoppel:

''After he had seen the option in the possession of the Ruhls, he purchased it, and paid $1,460 therefor in cash. The appellant never at any time informed him that the option was given without consideration, and his first knowledge of that fact was obtained on the trial when the appellant so testified. It was then too late for the appellant to assert that there was no consideration for the option. If authority is needed upon a proposition so plainly founded on equitable principles, a case in point is **Stewart v. Metcalf, 68 Ill. 109**, in which it was held

that, in the absence of fraud, a party to a written contract will be estopped from averring anything against the deliberate recitals and admissions contained in the same, especially when it will prejudice and work injury to others who have acted in good faith upon the belief of the facts as stated in the contract."

Hoogendorn v. Daniel, 178 F. 765, 767, C. C. A. 9th.

In the second case this court went considerably farther than the trial court did in our case because it upheld the lease which had been given after the action had actually been commenced to recover the interest in the mining claims, although the plaintiff in that suit had expressly assented to the granting of one of the leases he had not agreed to the other, but was estopped as he knew of it and made no objection.

Cascaden v. Dunbar, 191 F. 471. C. C. A. 9th.

(c) Estoppel by Deed.

In this case Appellants gave a deed to O. A. Nelson covering the mining claims and confirmed it by their letter of April 16, 1933, and on the strength of this, N. P. Nelson took the lease in question upon this appeal. The rule is well settled that Appellants cannot deny the effect of the deed.

The Supreme Court in a recent case held that where the holder of a certificate of title entrusted it to another, who in turn presented it, together with a forged conveyance to himself, to the registrar and thereupon ob-

tained a new certificate of title and afterwards the land was bought by a third party in good faith, such original owner was estopped and must bear the loss.

> "There are few constitutional rights that may not be waived. * * * * " As between two innocent persons, one of whom must suffer the consequence of a breach of trust, the one who made it possible by his act of confidence must bear the loss."

Eliason v. Wilborn, 281 U. S. 457, 74 L. ed. 962, 967.

A deed executed and delivered is conclusive as to the intention of the grantor to convey the property.

Mascarel v. Mascarel's Ex'rs., 86 P. 617, Calif.

Hart v. Anaconda Copper Mining Co., 222 P. 419. Mont.

Rocky Cliff Coal Mining Co. v. Kitchen, 222 P. 658. N. M.

The Supreme Court of Oklahoma quotes with approval the following:

> "**Caspersz**, in his work on **Estoppel and Res Judicata (3d Ed.) pp 282, 283**, says:
>
> 'Deeds are called solemn instruments. * * * * It is right to suppose that what is stated in deeds, and other similar documents, represent the true state of things, and, consequently, parties should not be allowed afterwards to question the truth of what has been deliberately stated. * * * * Under these circumstances it appears to us that justice, equity, and good conscience require no more than that a party to such an instrument should be precluded from contradicting it to the prejudice of another person, when that other, or the person through whom the other person claims, has been in-

duced to alter his position on the faith of the instrument.'

"The doctrine of acquiescence may be stated thus: 'If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as to really induce the person committing the act, and who might otherwise have abstained from it, to believe he assents to its being committed, he cannot afterwards be heard to complain of the act, * * * * and it is no more than an instance of the law of estoppel by words or conduct..' **Caspersz, Modern Estoppel and Res Judicata (3d Ed.) p. 67.**"

Nickel v. Janda, 242 P. 264, 266, 267. Okla.

(d) Clothing Another with Apparent Title.

The courts have universally held that where the owner of real property has clothed another with apparent title he is estopped to set up his title where others have acted upon such apparent title, even where he acted in good faith at the time and without any intent to defraud.

Macaulay v. Dorian, 147 N. E. 793. Ill.

Whalen v. Schneider, 118 N. E. 41. Ill.

Mills v. Rossiter, 103 P. 896. Calif.

Westerman v. Corder, 119 P. 868. Kan.

Carruthers v. Whitney, 105 P. 831. Wash.

Bush v. Roberts, 110 P. 790. Ore.

Beno v. Norris, 151 P. 731. Ore.

Kime v. Krenek, 143 N. W. 473. Neb.

Loughran v. Gorman, 99 N. E. 886. Ill.

Schweiter v. Hooker, 162 P. 981. Wash.

Helwig v. Fogelsong, 148 N. W. 990. Iowa.

The same rule has been applied even where there was a crime committed by the one who had apparent title.

Baillarge v. Clark, 79 P. 268. Calif.

Quick v. Milligan, 9 N. E. 392. Ind.

United States Nat. Bank of Portland v. Holton, 195 P. 823. Ore.

Heckman v. Davis, 155 P. 1170. Okla.

Havel v. Costello, 175 N. W. 1001. Minn.

(e) Same Rule as to Personal Property.

National Safe Deposit, Savings & Trust Company v. Hibbs, 229 U. S. 391, 57 L. ed. 1241.

MacAndrews & Forbes Co. v. U. S., 23 F. (2d) 667. C. C. A. 3d.

Emmett Irr. Dist. v. Thompson, 253 F. 316. C. C. A. 9th.

Crowder v. Yovovich, 164 P. 576. Ore.

Carter v. Rowley, 211 P. 267. Calif.

(f) Acquiescence.

It is our contention that N. P. Nelson was given possession by Appellants, that he entered with their full knowledge and consent and immediately started prospecting, getting in a large quantity of supplies and equipment, building a ditch and doing other dead work and that was sustained by the Trial Court. Under this condition Appellants were also estopped to deny the validity of his lease.

"The primary ground of the doctrine (estoppel) is, that it would be a fraud in a party to assert what his previous conduct had denied, when, on the faith of that denial, others have acted. '**Hill v. Epley, 31 Pa. 334.** * * * * No one is permitted to keep silent when he should speak, and thereby mislead another to his injury. If one has a claim against an estate and does not disclose it, but stands by and suffers the estate sold and improved, with knowledge that the title has been mistaken, he will not be allowed afterwards to assert his claim against the purchaser.' "

Gregg v. Von Phul, 68 U. S. 282, 17 L. ed. 536, 537.

First Federal Trust Co. v. First Nat. Bank of San Francisco, 297 F. 353. C. C. A. 9th.

Management & Investment Co. v. Zmunt, 59 F. (2d) 663. C. C. A. 6th.

Milligan v. Miller, 97 N. E. 1054. Ill.

Syster v. Hazzard, 229 P. 1110. Idaho.

(g) **Mining Cases.**

Where the owner of a mining claim put another in position to hold himself out as holder of an option to sell, and purchasers dealt with such other on the assumption, the owner cannot urge the agency of such other and his misconduct as ground for setting aside his deed to the purchasers, since one who makes it possible for a person to perpetrate a wrong on another must suffer the consequences.

Keyworth v. Nevada Packard Mines Co., 186 P. 1110. Nev.

Where the owner of an inchoate title to mining claims, with right to possession which was susceptible

to abandonment, permitted another to relocate and incur expenses in development work on such claims and remained silent although he had knowledge of the work, he was estopped to assert his possessory right to the claims.

Sharkey v. Candiani, 85 P. 219. Ore.

Florence-Rae Copper Co. v. Iowa Mining Co., 178 P. 462. Wash.

Even though F was the owner and his title was of record where F gave to a corporation an option to purchase certain mines and mining property, and caused the company to post a notice that it was the owner and F knew of this notice and the miners and laborers were working upon the faith of the notice and under the belief that they could have a lien, held F was estopped.

Eastwood v. Standard Mines & Milling Co., 81 P. 382. Idaho.

(h) Loss Between Two Innocent Parties.

Even if we admit for the purpose of this argument only that O. A. Nelson took the deed from the Appellants in bad faith (and we submit that such is not the fact and is not shown by the testimony) still Appellants are estopped as to the N. P. Nelson lease because of the equitable rule that where one of two innocent persons must suffer the loss occasioned by the wrongdoing of a third, the one who by his negligence or inadvertence has placed it in the power of the wrongdoer to perpetrate the wrong, which could not otherwise have

been done, must suffer the loss, rather than the other innocent party.

National Safe Deposit, Savings & Trust Company v. Hibbs, 229 U. S. 391, 57 L. ed. 1241. (Supra.)

Bridges v. Hurlburt, 178 P. 793. Ore.

This rule is cited with approval in a great many of the cases previously given with reference to other points of law.

It is intimated in the brief of Appellants that N. P. Nelson was a party to a great conspiracy to defraud Appellants and was not acting in good faith, but no evidence of this was, or can be, pointed out by Appellants. It is admitted that he obtained credit for supplies and freight from the Chitina Cash Store owned by O. A. Nelson, (Tr. 141), but there was certainly nothing wrong in this. Appellants themselves had been doing the same thing for years.

And, as far as that goes, the history of this whole case discloses that there never was any idea on the part of anyone, O. A. Nelson included, to defraud Appellants. On the contrary, the record will disclose that instead of O. A. Nelson being "a designing creditor who engineered his nefarious schemes," the creditors were actuated by a desire to save some equity out of the property for Appellants. They could have gone ahead and foreclosed the mortgage, but voluntarily made the offer to Appellants to work out a plan whereby Appel-

lants would eventually get the property back. Appellants, instead, on their own proposition (Tr. 106) voluntarily gave an outright deed under which N. P. Nelson took the lease in question. We submit that this case fairly comes under the following rule:

> "No principle is more universal in the jurisprudence of civilized nations, no principle is more equitable in itself, or more salutary in its effects, than that no one may, to the damage of another, deny the truth of statements and representations by which he has purposely or carelessly induced that other to change his situation."
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> **Illinois Trust & Savings Bank v. City of Arkansas City, 76 F. 271, 293. C. C. A. 8th.**

LEASE ROYALTY

With regard to the adequacy of the royalty of 10 per cent gross raised by Appellants in their brief at page 41, we desire to point out to the Court that they did not in their Complaint or Reply allege that it was inadequate nor is there one statement anywhere in the evidence in this case that such a royalty was inadequate or unfair, nor did they attempt to point out any such evidence. The amount of royalty in a mining lease is subject to many conditions that vary from district to district, such as the character of the ground to be worked, its value, whether it is proven or not, the cost of mining, the amount of dead work to be done, etc., that it is impossible to say that such and such a royalty is inadequate as a matter of law. The royalty is 10 per cent gross in

the present lease was in fact a fair royalty and was so considered by the Trial Court.

CONCLUSION

In conclusion we desire to call the attention of the Court again that the case is even stronger when dealing with mining claims than with other types of property, and this can be best said by quoting from the Supreme Court in the case of **Johnston v. Standard Mining Company, 148 U. S. 360, 37 L. ed. 480 at 486,** in which it is said:

> "While there is no direct or positive testimony that plaintiff had knowledge of what was taking place with respect to the title or development of the property, the circumstances were such as to put him upon inquiry; and the law is well settled that, where the question of laches is in issue, the plaintiff is chargeable with such knowledge as he might have obtained upon inquiry, provided the facts already known by him were such as to put upon a man of ordinary intelligence the duty of inquiry. * * * *
>
> "The duty of inquiry was all the more preemptory in this case from the fact that the property of itself was of uncertain character, and was liable, as is most mining property, to suddenly develop an enormous increase in value. This is actually what took place in this case. * * * * Under such circumstances, where property has been developed by the courage and energy and at the expense of the defendants, courts will look with disfavor upon the claims of those who have lain idle while awaiting the results of this development, and will require not only clear proof of fraud, but prompt assertion of plaintiff's rights. * * * *

"The language of Mr. Justice Miller in **Twin Lick Oil Co. v. Marbury, 91 U. S. 587, 592,** with regard to the fluctuating value of oil wells, is equally applicable to mining lodes: 'Property worth thousands today is worth nothing tomorrow; and that which today would sell for a thousand dollars at its fair value, may, by the natural changes of a week or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit.' "

We respectfully suggest, therefore, that there was ample reason, both upon the law and the facts, for the Trial Court to hold that Appellants were estopped to deny the validity of the lease given to Appellee N. P. Nelson by Appellee O. A. Nelson, and that the judgment should be affirmed.

Respectfully submitted,

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